

Capital Program Management's (CPM) Negotiation/Review Process for Potential Error and Omission against a Designer

Step 1- Project Manager/Program Manager Review

Step 2- CPM's Design Issue Committee

Step 3- Non-Binding Mediation Process

USE

This process is to be used when the Design Consultant does not agree with or does not resolve the New Jersey Department of Transportation's (NJDOT) request to recover damages from an alleged Design Error and/or Omission.

And

This process is to be used when there is **no** Contractual Notice "of Claim" received by the New Jersey Department of Transportation from the Contractor.

Requirement

This procedure must be placed into every Design agreement and/or Task Order.

PROCESS to be placed in Designer's Contracts

1. **STEP 1** - A Negotiations Meeting will be held with the Project Manager, Program Manager, Resident Engineer and the Consultant Designer in an effort to resolve what the NJDOT affirms is a recoverable Error/Omission. The Project Manager will schedule the meeting within 30 days of receiving the Consultant Designer's response to the Level 2 Letter.
2. If an Errors & Omissions (E & O) dispute is not resolved at a negotiation meeting with the Project Manager/Program Manager, the dispute may proceed to the CPM Design Issue Committee, if mutually agreed to by the Designer and NJDOT. The Designer must first, by letter, reject the Project Manager/Program Manager settlement demand and either request or accept a review by the CPM Design Issue Committee of the dispute. If agreed to by the Department, a CPM E & O Committee meeting will be scheduled within 60 days of the date of the rejection letter by the Secretary, Department Claims Committee.
- C. **STEP 2** - The CPM Design Issue Committee will be comprised of three members of the NJDOT's Management who are selected by the Assistant Commissioner, Capital Program Management (CPM);

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however the Program Manager that is responsible for this project cannot be selected as one of the CPM Design Issue Committee members. The Assistant Commissioner will select one of these members as chairperson. Additional non-voting members may include a Deputy Attorney General, the Secretary of the Claims Committee, and a member of the Federal Highway Administration.

- D. The Secretary, Department Claims Committee, no later than 60 days from the date that the CPM Design Issue Committee meeting was held, will notify the Designer in writing of the CPM Design Issue Committee's settlement demand or determination.
- E. The Designer, within 30 days of receipt of the CPM Design Issue Committee's settlement determination will reply in writing to the Secretary, Department Claims Committee of its acceptance or rejection of the CPM Design Issue Committee's settlement determination. If the Secretary, Department Claims Committee receives no reply, it will be considered a rejection of the Committee's settlement determination.
- 1. If an Errors & Omissions dispute is also not resolved at the CPM Design Issue Committee, the dispute may proceed to Non-Binding Mediation, if mutually agreed to by the Designer and NJDOT. The Designer must first, by letter, reject the CPM E & O Committee's settlement determination and send a request to the Secretary, Department Claims Committee to proceed to Non-Binding Mediation, within 30 days of receipt of the CPM Design Issue Committee's Determination.

E. H. **STEP 3** - Non-Binding Mediation

- a. Conditions. If the Designer submits a timely request for or accepts a review by Non-Binding Mediation, and the Department tentatively agrees to participate in Non-Binding Mediation, the Designer must satisfy the following conditions to proceed:
 - 1. The Designer has entered into a Non-Binding Mediation Agreement.
 - 2. The Designer has submitted the names of six proposed Mediators. Include the fee schedule and the biographical background listing the experience and qualifications of each candidate. If a candidate was engaged by the Department or Designer, identify the project and when the candidate served. If a candidate was employed by the Department or Designer, identify when the candidate was employed and the candidate's job duties. The Designer may propose candidates that have been used for mediation purposes for this Project or another project.
- b. Mediator. The Department will select the mediator for the Non-Binding Mediation from the list of candidates submitted by the Designer. If the Department rejects the

proposed candidates, the Department will request the Designer to submit four additional candidates that meet the original criteria. Submit this additional list within 15 days of the receipt of a written request from the Department. The mediator must be acceptable to both the Designer and to the Department for the Non-Binding Mediation to proceed. Upon mutual agreement, the Mediator can be an individual proposed by the Department.

- c. Meeting. Upon selection of the mediator and the return of the executed Non-Binding Mediation Agreement, the Secretary of the Department Claims Committee will schedule a meeting for the Non-Binding Mediation.
- d. Decision. If an agreement is reached at Non-Binding Mediation, it will be forwarded for Department approval.

Details of Process

1. Prior to issuance of the Level 2 letter, CPM Management with D.A.G. counsel will determine if the Error & Omission may be recoverable.
2. The Project Manager will discuss the Designer's request to proceed to or accept a review by the CPM Design Issue Committee with the Program Manager and the Director, Capital Project Manager to determine if the NJDOT agrees to a CPM Errors and Omissions Committee meeting. A decision may require consulting with the Deputy Attorney General's office.
3. If the NJDOT agrees to a CPM Design Issue Committee, the Project Manager will notify the Secretary, Department Claims Committee of the Designer's request to proceed to or accept a review by CPM Design Issue Committee.
4. The Secretary, Department Claims Committee will coordinate the scheduling of a meeting of the CPM Design Issue Committee.
5. The Project Manager and/or the Program Manager will make a presentation to the Committee members separately from the Designer.
6. The Designer will make a presentation to the CPM Design Issue Committee members separately from the Project Management staff.
7. After hearing presentations from the Designer and the NJDOT, the CPM Design Issue Committee members will meet in Executive session and make a settlement determination. The Assistant Commissioner, CPM, must approve this determination before the Designer is notified.
8. The Secretary, Department Claims Committee will discuss the Designer's request to proceed to or accept a review by Non-Binding Mediation with the Director, Capital Project Management and the Assistant Commissioner, CPM to determine if the NJDOT agrees to a Non-Binding Mediation.

9. If the NJDOT agrees to Non-Binding Mediation the Secretary, Department Claims Committee will coordinate the scheduling of a meeting for the Non-Binding Mediation.
10. The Project Manager and/or the Program Manager may be asked to make a presentation at the Non-Binding Mediation.
11. If an agreement is reached at Non-Binding Mediation, it will be forwarded for Department approval.
12. Negotiating Authority Limits with Designers
 1. Program Manager -\$100,000.00 for each individual issue, no aggregate limit.
 2. Director, Project Management - \$250,000.00 for each individual issue, no aggregate limit.
 3. Assistant Commissioner, CPM - unlimited
 4. CPM Errors & Omissions Committee - unlimited.
 - Non-Binding Mediation Team - unlimited

Additional Information to Consider

Administrative Costs may be considered:

A rough estimate of what the administrative costs will be to the Department (man hours of time for all individuals including Construction staff, Project Management staff, Claims Section staff, Director time, Assistant Commissioner time, Deputy Attorney General's time, Accounting staff, etc.) needs to be calculated prior to engaging the Designer concerning a design issue. If the design issue may result in damages to the Department that are less than the costs that will be accrued by the Department to engage and settle the issue, then it may be in the best interest of the Department to not pursue the damages. (For example: If the design error or omission causes the Department to accrue \$500.00 in damages but the costs to pursue these damages amounts to \$10,000.00, then it may be decided not to pursue the damages).

Non-Cost Factors may be Considered:

Other factors may need to be taken into account that may be more important to the Department from a legal or functional perspective than costs when determining if the Department needs to pursue damages from the designer. This should be decided on a case-by-case basis.